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# THE FORUM.

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## THE RULE AGAINST PERPETUITIES.

Perhaps with Professor Gray, we may say that the law aims to forward the circulation of property[1] and that it adopts two means of doing so. One of these means is the so-called rule against Perpetuities, the other is the disallowance of restraints upon alienation. He narrates that when he began to collect the authorities on perpetuities, he did not clearly comprehend that the Rule against Perpetuities had no direct connection with restraints on alienation, and that intending to devote a chapter to these restraints, as he went on he saw that such a chapter would be out of place in the contemplated treatise, and that he therefor concluded to treat, and did treat, the subject of Restraints on Alienation of Property in a separate essay.[2] Unfortunately this distinction has not been always perceived by the judges or the legislature of Pennsylvania, and the word Perpetuity has frequently been applied by them to two totally different things, the incapacity of the owner of an interest to sever it from himself by alienation, and the non-existence for a certain period of time of any certain owner. In this article the word is used, as Professor Gray uses it. The thing to be discussed, is the rule invented to prevent the creation of interests which remain contingent for an undue time.

### THE RULE.

Prof. Gray thus states the Rule. "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."[3] "Perpetuities"

[1]Perpetuities, p. 2.

[2]These two doctrines, says Gray, "have had a separate development. The attempts to combine them have led to confusion." Perpetuities, 92.

[3]Perpetuities p. 166. Cf. definition in Hillyard v. Miller, 10 Pa. 326; quoted in Mifflin's Appeal, 121 Pa. 205.

says Lowrie, C. J. "are grants of property wherein the vesting of an estate or interest is unlawfully postponed. * * and they are called perpetuities, not because the grant, as written, would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of title, or of its vesting, or, as it is sometimes, with less accuracy expressed, to a perpetual prevention of alienation. * * According to this definition, a present gift to a charity is never a perpetuity, though intended to be inalienable, * * and no vested grant is a perpetuity. The law allows the vesting of an estate or interest, or the power of alienation, to be postponed, and the accumulation of its increase to be made previous to vesting, for the period of lives in being, and twenty-one years and nine months thereafter, and all restraints upon the vesting, that may suspend it beyond that period, are treated as perpetual restraints, and therefore as void, and consequently, the estates or interests dependent on them are void, and nothing is denounced as a perpetuity that does not transgress this rule."[4] Clark, J., quoting from Gray, says, "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."[5]

APPLICABLE TO WHAT PROPERTY

The rule forbidding the creation of interests to vest after too long a time is applicable not merely to realty but also to personalty.[6] It applies, e.g. to a legacy of the proceeds of a sale of land[7] to a legacy to one, subject to a limitation to another, on the occurrence of a certain event.[8]

THE PERIOD.

The period within which the vesting must occur, is usually defined as a life or lives in being and twenty-one years after. Among the 1,500,000,000 of people in the world, there is always some life which is beginning when the devise or conveyance is taking effect, and which will continue for 100 years or more.

[4]Philadelphia v. Girard's Heirs, 45 Pa. 9; Johnston's Estate, 185 Pa. 179; Yard's Appeal, 64 Pa. 95,

[5]Lawrence's Estate, 136 Pa. 354.

[6]Gerber's Estate, 196 Pa. 366; Lawrence's Estate, 136 Pa. 354.

[7]Hubley v. Long, 2 Gr. 268.

[8]Kelso v. Dickey, 7 W. & S. 279; Diehl v. King 6 S. & R. 29; Weiser v. Zeigler, 192 Pa. 394; Scott v. Price, 2 S. & R. 59.

The rule does not allow a suspension of vesting until every life existing when the limitation is made, is ended.[9] Some determinate life must measure this period of suspense. It is not however, necessary that the life thus adopted, be that of a person in whom any prior interest or estate is vested. A devise to the children of A at his death, A being alive when the will goes into operation, would be valid, although there was no earlier devise to A. Nor is it necessary that the person whose life is the measure, be in any way related, on the one hand, to the creator of the estate, or on the other, to the grantees or devisees of the future interests. A probably may devise to the children of X (a stranger to him), who shall be alive at the death of Y (a stranger to both A and X), an estate in land or money. It is enough that the testator or grantor contemplates the close of the life of some determinate person as the point of time when the estate is to vest, or the point of time within twenty-one years of which, the estate is to vest.

### THE TWENTY-ONE YEARS.

The period of twenty-one years may be added to that of a life or lives in being, and a vesting postponed until its expiration. Thus an estate may be given to such children of A (a person in existence when the gift is made) as shall be alive twenty-one years after A's death, or to such children of A as shall attain the age of twenty-one years, or after an estate for twenty-one years in X, commencing after a life estate in A, over to Z, should certain things happen during those twenty-one years.[10] But, if the period of vesting is twenty-five years,[11] or twenty-two years[12] after lives in being, it is too long deferred. A testator ordered that his son A, and A's son B, or the survivor should have the income of his farm during life. Then, after the death of the survivor, and of all other children of B, and after the youngest grandchild of B, had become twenty-two years old, he directed that the farm be sold, and its proceeds divided among the then lawful heirs of B. Since the period of this sale might possibly be more than

[9] In re Moore, 1 Ch. 936. "A testator bequeathed personal property for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death." The legacy was held bad for uncertainty. Gray, Perpetuities, p, 187.

[10] Pepper's Estate, 120 Pa. 235.

[11] Coggins' Appeal 124 Pa. 10. Cf. Boyd's Estate, 199 Pa. 487.

[12] Gerbers' Estate, 196 Pa. 366.

twenty-one years after the lives of A and B, the son and grandson, it was too remote.[13] A gift to A for life, remainder to her son B, for life, with a proviso that on his reaching the age of twenty-five years he should receive $25,000 absolutely. The validity of the gift of $25,000 depends on B attaining twenty-five years within twenty-one years after the death of A, who was the daughter of the testator.[14] A gift to grandchildren who shall have attained the age of twenty-five years, after a gift to the widow and the parent of such grandchildren for their lives, is for the same reason void.[15] The term of twenty-one years may be taken in gross. It need not be the infancy of the person in whom the interest is intended to vest.[16] Doubtless, twenty-one years may be added to X's life in being, when the first gift is to X, with an executory devise (no less than a remainder) over to another, but a gift over to Y in defeasance of the estate in X, on Y's attaining thirty years of age, would be void. A bequest was made to X absolutely. If he died under thirty years of age, leaving issue, the money was to remain invested and divided among his issue, on their attaining thirty years of age. If this interest in the issue did not vest until they reached thirty years of age, the gift to them was void.[17]

WHEN NO LIFE IS ADOPTED AS THE MEASURE.

When a life is adopted as the measure, a vesting within twenty-one years after its close is early enough. When a period is selected, which is not made to follow a life, it can never exceed twenty-one years, and the possible period of gestation of the donee of the interest. "If an absolute term is taken, and no anterior term for a life in being is referred to, such an absolute term cannot be longer," says Perry,[18] "than twenty-one years." Hence a devise to such persons as shall at the end of 75 years, be the children or legal descendants of children of the testator, is void, because the vesting is made to occur at a period of years exceeding twenty-one years, and not at the end of twenty-one years or less, after lives existing at the death of the testator.[19] When the

[13]Gerbers' Estate, 196 Pa. 366.

[14]Boyd's Estate 199 Pa. 487.

[15]Coggins' Appeal, 124 Pa, 10.

[16]Gray, Perpetuities, 190.

[17]Ward's Estate, 8 Dist. 701.

[18]Trusts, p. 349.

[19]Johnston's Estate, 185 Pa. 179.

period for vesting is too remote, the limitation is wholly void. There is no validity for the part of the period which does not exceed the period of the rule.[20]

TIME BEYOND TWENTY-ONE YEARS AFTER LIFE EXPRESSLY SELECTED.

The vesting may be expressly made to occur after more than twenty-one years after lives in being. In such cases, there can be no doubt as to the application of the rule. Cases of this class are comparatively rare. Usually events are selected whose happenings may or may not occur within the period limited by the rule.

POSSIBILITY OF BREACH.

The event upon which the future interest is to vest must from the beginning be sure to happen, if at all, within the permissible period. The validity or invalidity of the arrangement must be known from the commencement, otherwise the object of the rule could be defeated. The interest could be in abeyance until the lapse of time should determine. If the estate is so conditioned that it may not vest in the proper time is it void *ab initio*.[21] It is not necessary that it be clear that it will not vest within the time nor that it be probable that it will not vest, nor that its vesting within the time is in equilibrium. Though the vesting within the time be probable, the rule will defeat the interest,[22] *a fortiori* if the vesting is merely possible.[23]

GIFT TO A CLASS.

The contingent gift of an interest may be made to a class of persons. If there is a possibility that the event which is to cause the vesting of the interest, will not occur with respect to any member of the class, the gift is wholly void. A's bequest of an estate to X as trustee, was for the payment to each of A's four children, B, C, D and E, of one fourth of the net income. Upon the death of any one of the children, the principal was to be given to his or her children "who shall have attained or shall attain the age of twenty-five years, and the issue of any who shall die under that age, leaving issue." The latter gift was under-

[20]Rhodes' Estate, 147 Pa. 227

[21]Hillyard v. Miller, 10 Pa 326; Rhodes' Estate, 147 Pa. 227; Smith's Appeal,88 Pa. 492; Smith v. Townsend, 32 Pa.; 435; Donohue v. McNichol, 61 Pa. 73: Myers' Estate, 17 Phila. 425; Boyd's Estate, 199 Pa 487.

[22]Gerber's Estate, 196 Pa. 366.

[23]Coggin's Appeal, 120 Pa. 10.

stood as not being to such children of a child, as at the child's death should have attained twenty-five years of age, but to such as should, whether before or after the child's death, attain that age. It was possible that none of the children of a child, should reach twenty-five years of age, until more than twenty-one years after the child's death. Hence, the gift over to them was void.[24] A bequest was made to a trustee to pay the interest on one sixth of the estate to each of six children. After the death of the last of the children and "the lapse of ten years from the date when my youngest grand-child shall have become of age" the principal of the estate was to be divided equally among the then living grand children. Since a point of time ten years after the majority of the youngest grand-child might be more than twenty-one years after the death of the last child of the donor, the gift to grand-children was wholly void.[25] After a devise to a daughter for life and then to her children for life, a devise in fee to her grand-children is void because they may all come into existence beyond the period of the rule.[26] A, having a son B, and eight grandchildren, issue of B, and seven great-grand-children, being grand-children of B, gave his estate to trustees, and directed them, after the death of all his grand-children, and after the youngest then living grand-child of B had become twenty-two years of age, to sell the land and divide the proceeds among the then lawful heirs of his son. The gift to the heirs of the son might not vest until more than twenty-one years after the death of B and of all the children of B, and was void.[27] A residuary estate was given to X in trust for A for life, then for the issue of A for their lives, then upon the death of all the issue of A, or upon the death of A without issue to survive, for the then heirs of the testator. The gift to heirs was void, because they were not ascertainable until a period possibly too remote, viz: the death of issue of A who were born after the testator's death, and whose death might occur more than twenty-one years after the death of persons in being, when the devise went into operation.[28] A gift for seventy-five years to X was

[24]Coggin's Appeal, 124 Pa. 10.

[25]Kountz's Estate, 213 Pa. 390.

[26]Davenport v. Harris, 3 Gr. 164.

[27]Gerber's Estate, 196 Pa. 366.

[28]Donohue v. McNichol. 61 Pa. 73. If the testator meant those who were heirs at his death, A, being the only child, would have taken the land in fee.

in trust to pay the net income to the testator's children, or the issue of children dying, during that period, and, at the end thereof to sell the land and divide the proceeds among the then living children, and the issue of children then dead. This direction to sell and gift of the proceeds were void.[29] A gift to a trustee for sons, absolutely, their shares not to be paid until they severally reach the age of thirty years, is followed by a provision that if any of them dies under thirty years, leaving issue, the gift shall go over to the issue when they reach thirty years of age. Treating this gift to issue as contingent on their attaining the age of thirty years, which they might not do until more than twenty-one years after the lives in being, the gift to them was void; and that to the sons became free from contingency.[30]

EFFECT OF VOIDNESS AS TO SOME MEMBERS OF A CLASS.

It is said by Paxson C. J.[31] "And if the gift is to a class and it is void as to any of the class, it is void as to all. Authority is scarcely needed for so familiar a proposition." He cites nevertheless, several English authorities, and a previous decision by himself in Smith's Appeal.[32] In this case, A had devised his estate to trustees, to pay one-fourth of the income for life to each of three daughters; at the death of any, to transfer this one-fourth, to the daughter's appointees by will, or, no appointment being made, to transfer it in equal portions to her children. If no children survived her, the fund was to be held by trustees for A's surviving children. One of A's daughters, B, appointed her one-fourth to trustees, to pay the income thereon to her children, living at her death (and who had also all been living during A's lifetime), for life; and after their deaths, to transfer the share of the one-fourth upon which any such child had received the income during life, to the appointees by will of such child, or, he or she making no appointment, to such person as would be entitled, had he or she died intestate, owning the same. Remarking that the appointment of B must be conceived as written into A's will, in order to determine its validity, Paxson, C. J., concludes that the gift by A to B for life, remainder to her children, would have been bad "for the reason that it includes

[29]Johnston's Estate, 185 Pa. 179.

[30]Wood's Estate, 8 Dist, 701.

[31]Coggins' Appeal 124 Pa. 10. The same doctrine was implied, tacitly, in Mifflin's Appeal 121 Pa. 205.

[32]88 Pa. 492.

children born after the death of A. It is not a sufficient answer to this to say that in point of fact there were no such after-born children, and that all of Mrs. Smith's [B's] donees, were *in esse* when Mr. Ryan [A] died. There might have been after-born children, and because of this possibility the law strikes down the appointment as being within the rule prohibiting perpetuities. Had the gift been to her sons and daughters *eo nomine* [he clearly means *nominatim*] the case might have been different. This could have been done by Mr, Ryan in his will, for the parties were all living when he died." The chief justice was in error in deciding that the gift after her death to children of his daughter, not born during A's lifetime, was a violation of the rule against perpetuities, as he himself almost concedes.[33] Whether born in A's lifetime or not, they must be born in their mother, B's lifetime. A gift to them was therefore a gift vesting immediately at the close of a life in being when A's devise began to operate But the chief justice repeats in the case last referred to, his adhesion to the principle that if a gift is to a class, to some of the members of which it is void, it is *ipso facto* void as to all. Although in Smith's Appeal, some of the children were alive in the testator's lifetime, others might have come into existence, and at the time of the daughter's death, all that had been born before the testator might have died, leaving only those born subsequently thereto. It would be uncertain then, on A's death, whether any existing children of B, the daughter, would take under the terms of the gift; and, if any, how many and what shares.[34] Had A given to each of the children of B, a determinate sum, the gift to each member of the class "children" would have been separable from those to the other members and the voidness of the gifts to such of them as were not born till after A's death, would not have involved the voidness of the gifts to such as were born before.[35] When a gift is to children of X, the possibility of the birth of children after the

[33]Coggins' Appeal, 124 Pa. 10.

[34]Cf. Gray Perpetuities, p. 315.

[35]Gray, Perpetuities, p. 324. Gray criticises Smith's Appeal (Perpetuities p. 329.) as made in oblivion of this principle. But he fails to note that Paxson C. J. refrains from saying whether an appointment by the children of B, the daughter, would under her will, have been valid, and it is to this appointment that the remarks of Gray are directed. In holding that the gift to the appointees of B was void, the decision, as Gray remarks, was wrong, because it necessarily vested even in children born after A's death, within lives in being.

date of the gift, whatever the age of X, whether X be male or female, is always assumed. Even had X "been past the age of child-bearing," said Penrose J., "when the testator died, the legal possibility of issue, would make the limitation [i. e. to children of X, a daughter of the testator, who should reach the age of twenty-five years] void."[36]

THE VESTING.

The rule prohibits the undue postponement of the vesting of an estate or interest; and not of the commencement of the possession or enjoyment of it. If A has a term of 1000 years, B's remainder or reversion thereupon, is not invalid because his possession will be so long deferred. In determining therefore, whether a limitation offends the rule against perpetuities, the inquiry must be directed to the time of the vesting, and not to that of taking possession.[37] A legacy may vest before the time at which it is to be paid to the legatee. A bequest being made of the income to two children during life, and, the fund producing which at their decease was to be divided equally among their children, who might then be living, or the issue of children then dead, "as they arrive at legal age," the gift of the fund was valid; because it vested in the children, or issue, instantly upon the death of the life legatees. Their majority was simply the time of payment.[38] In Barclay v. Lewis[39] a bequest was made to trustees, who were to pay the income less annuities to sons, to the testator's wife and daughter. The estate after the death of the wife and daughter was to be held for the benefit of the children of the sons and the daughter, and until such children should be twenty-one years of age and was then to be equally divided among them. It was held that this interest vested in the chil-

[36]Rhodes' Estate, 147 Pa. 227. Gerbers' Estate, 196 Pa. 366.

[37]Coggin's Appeal, 124 Pa. 10; Hubley v. Long, 2 Gr. 268; Lawrence's Estate, 136 Pa. 354; Siddall's Estate, 189 Pa. 127, Johnston's Estate, 185 Pa. 179; Kountz's Estate, 213 Pa. 390. In Rhodes' Estate, 147 Pa. 227 was a life estate in a daughter, remainder to testator's nephews and nieces. A codicil provided that should children survive the daughter under twenty-five years of age, they should receive an annuity, and that the estate remain in the hands of the trustee without division until these children reach the age of twenty-five years. This simply postponed the time of payment not the time of vesting of the legacies to nephews and nieces; The gift to them did not offend the rule against perpetuities.

[38]Siddall's Estate 186 Pa. 127; Smith's Estate, 210 Pa. 604.

[39]67 Pa. 316.

dren at birth, but that the time of enjoyment was deferred until their respective majorities. A gift of certain annuities was made. After the death of the annuitants, the income was directed to be paid annually to a charity until the sums received by it should amount to $20,000. Then from the corpus was to be taken $500,000 and paid to the University of Pennsylvania. The last gift was vested from the death of the testator. Possession of it only, was deferred.[40] When a will contains no expression of a gift except the direction to pay, there is no vesting of an interest until the arrival of the time for payment. A's will directed that after the death of the last child of the testator, "and the lapse of ten years from the date when my youngest grandchild shall have become of age, the principal of the whole estate shall be equally divided among my grand-children." No interest vested before the lapse of the ten years.[41] An interest is contingent not when given in default of the execution of a power conferred upon the prior taker, (in which case it would be considered vested, but subject to be divested by the execution of the power) but when given in sequence after a prior contingent estate, which fails. Thus a devise to A for life, then to the appointee of A for life, remainder to the children of the appointee but, if there should be no children, to X, an existing person, the gift to X is contingent until the appointee's death. If the gift to his children is void, because of the rule against perpetuities, so is the gift to X.[42]

### WHAT IS VESTING.

The capacity of a remainder, to take effect immediately in possession, if the particular estate were to terminate, is the criterion of a vested, as distinguished from a contingent remainder. It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. "The present capacity of taking effect in possession—if the possession were to become vacant—distinguishes a vested from a contingent remainder, and not the certainty that the pos-

[40] Lennig's Estate, 154 Pa. 209.

[41] Kountz's Estate, 213 Pa. 390. In Shallcross' Estate, 200 Pa. 122 a bequest was made to trustees, for seven minor children (named) of a son, until they severally should arrive at twenty-one years of age. A codicil extended the time of payment to the age of twenty-five. The legacies were held to be vested and the postponement of payment beyond majority, void. There were no expressions making the trust a spendthrift one.

[42] Boyd's Estate, 199 Pa. 487.

session will ever become vacant while the remainder continues."[43] A remainder was held vested because it "was ready at any time after the death of Ann Appleton, to come into the possession of the Baptist Union whenever and however the life estate might determine."[44]

WHEN EVEN A VESTED ESTATE IS WITHIN THE RULE.

In Morris v. Fisher,[45] the testator devised land to A for life, remainder for ninety-nine years, to B, if he should live so long; if he should die within the ninety-nine years, to the issue of his body; after the expiration of the term, or on the death of B without issue, to C, a living person and the heirs male of his body. Sultzberger, J., held the limitation over to C, though vested, void, remarking that the word perpetuities in Pennsylvania, includes estates which are inalienable, as well as estates[46] which are had for remoteness. The judgment was reversed by consent of parties. "This" says Gray, "looks as if the learned counsel for the defendant had little hopes of holding his judgment. It does not seem possible that he could or that a like decision of the U. S. C. C. for the Western District of Arkansas can be sustained."

CONTINGENT REMAINDERS.

That the rule against perpetuities applies to contingent remainders in land is the opinion of Prof. Gray.[47] It seems to have been tacitly assumed to apply to them in Pennsylvania. "All future estates," says Paxson C. J., "limited upon a life estate, which are not sure to take effect within twenty-one years and the usual fraction after the determination of the life estate are void in their creation."[48] There are, perhaps, no cases in which a contingent remainder in land has been declared void because the vesting was postponed beyond the period of the rule. The cases are usually trusts. If A gives land or personalty to a trustee in trust to pay the income or rents to B, during his life, and then to transfer the land or personalty to the children of B, that may then be living,[49] or to the appointees by will of B,[50] these

[43]Kountz's Estate, 213 Pa. 390.

[44]Lawrence's Estate, 136 Pa. 354.

[45]8 Dist. 161.

[46]Perpetuities, p. 174.

[47]Perpetuities, p. 256.

[48]Coggins' Appeal, 124 Pa. 10; Lawrence's estate, 136 Pa. 353.

[49]Siddall's Estate, 180 Pa. 127; Rhodes' Estate, 147 Pa. 227.

[50]Smith's Appeal, 88 Pa. as corrected by later decisions.

remainders are valid, because the vesting is not deferred beyond the proper time. A devising his estate to trustees, who were to pay the income to his wife for life, then one-fourth of the income to each of his daughters during life; then on the death of any daughter, to transfer the corpus to her children "who shall have attained or shall attain the age of twenty-five years," the last limitation would be valid, if it meant that, at the death of the daughter the property was to vest in such children as were then twenty-five years old. If it meant that the property was to vest in all the children on their attainment at any time, whether before or after the daughter's death, of the age of twenty-five years, it would be an executory devise, and not a remainder, and moreover, the time of vesting might transcend the period of the rule.[51] A gift was made to executors in trust to pay the rents and income to A and B, grandchildren of the testator, during their lives. After the decease of either, his share was to be for the use of such of his children as might then be living, or of the issue of any children that might have died, absolutely. If either A or B died without leaving issue to survive him, or if leaving issue, the issue should all die under the age of twenty-one years without issue, the share of A or B, should go to the survivor, or his issue. If both A and B died without issue surviving, or if, leaving issue, that issue should die within twenty-one years of age, without issue, the shares given to them were to pass over to others. This arrangement did not violate the rule against perpetuities. The limitation was not upon the death of issue generally, but at the death of A or B, or within twenty-one years thereafter.[52] A gift by deed after a life estate in A, in trust for such children of A as shall survive her, or the issue of any, that may then have died before her, leaving issue, upon their attainment of twenty-one years of age, or their being no such children or issue, that reach the age of twenty-one years, then to such persons as would be entitled, had the testator died without issue after the death of A. These gifts over were not too remote. A dying without issue, the next of kin of the settler, who would have been entitled had she died at the moment of A's death, received the gift.[53] A gift to widow during life, of so much of the income as is necessary, and of the excess to the five children

[51]Coggins' Appeal, 124 Pa. 10.

[52]Weinbrenner's Estate, 173 Pa. 440.

[53]Phillips' Appeal 93 Pa. 45.

during life. After their death respectively, to their children. The gift to the children of children, vesting at the close of the life of children, who were in being when the will went into effect, is valid.[54]

A devised property in trust for B, during his life. If he died without issue living, the property was to be delivered to A's "lawful heirs." If he died leaving issue, they were to have a life estate, and after their death, then it was to be for the use of A's lawful heirs. It was held that, if the ultimate use to heirs, meant such persons as, at the death of B, or the issue of B, would be heirs, it was too remote, since the persons taking might possibly not be ascertained until the end of a life which had not begun until after the death of A. If the ultimate use to heirs was to persons who were heirs at A's death, it was equivalent to an intestacy. But B dying without issue, the gift to heirs took effect, and this was within lives in being. Though then the remainder, after the life estate to the issue of B was too remote, the distinct remainder after the death of B without issue was not too remote.[55]

REMAINDER CONTINUED.

A devised real and personal property to a trustee, in trust for his sons B and C. On the death of either leaving issue, one half was devised to this issue. If either died before the other, his half was devised to the other in fee. If both died leaving no issue living, the estate was devised over to D and E in equal shares, in fee. On the death of B, without issue his half passed to C in fee. C dying childless, his widow was entitled under C's devise to her of the part thus obtained from B. The gift to the survivor of B and C was in fee. C subsequently died without issue. Thereupon, the gift over of C's original half, took effect as a remainder, and of the half obtained in the death of B, as an executory devise. Both remainder and executory devise were valid, since the event on which they were suspended was sure to happen, if at all, within lives in being when the testator died.[56] A bequeathed bonds to B in trust to pay the interest thereon, to two grandsons C and D, and should either die without heirs or children, to deliver his share of the bonds to X, his heirs and as-

[54]Smith's Estate, 210 Pa. 604.

[55]Donohue v. McNichol, 61 Pa. 73. Gray criticises this case, Perpetuities, p. 306.

[56]Lovett v. Lovett, 10 Phila. 537.

signs. This created a life estate in C and D, and a contingent remainder in X. The trust was therefore valid.[57]

SALE DIRECTED.

The rule of perpetuities applies to interests in the proceeds of a sale of land, directed to be made, as well as to interests in the land itself. If the sale is to take place beyond lives in being and twenty-one years subsequently, the direction to sell and distribute the proceeds will be void; otherwise not. A gift of land to a trustee for the benefit of A and B, children of the testator, for their lives, is followed by a direction to the trustee within one year after the death of the longer liver of the two sons to sell the land, and divide the proceeds, one half among the children of A, and the other among the children of B. If any of these children of A and B are minors at the time of the sale their share in the money is to remain a charge on the land, and is to be paid, with the interest to him when he reaches majority. If he should die before becoming twenty-one years of age, the money is to be paid to his heirs as they arrive at twenty-one years. For some reason an act of assembly is procured which authorizes a sale before the death of the survivor of the two children of the testator. The court, holding the direction to sell valid, and that the children of A, who died before the sale, had a vested interest, refused to order their shares in the money to be paid to them because they were still in their minority.[58] A power given to trustee to sell within ten years[59] or any other number of years not exceeding twenty-one, after the creation of the power would be valid. A power to sell not before, but at the expiration of seventy-five years from the establishment of the power, would be void.[60] A power to sell within twenty-one years after a life that is in existence when the power is created, would be valid[61] *a fortiori* one to sell within lives in being.[62] Thus a devise of a house to two sons; on the death of either without issue then surviving it was given to the survivor. On the death of both without issue, to survive them,

[57]Weiser v. Zeigler, 192 Pa. 394. The rule against perpetuities was not violated.

[58]Hubley v. Long, 2 Gr. 268. The time of payment was postponed, not that of vesting.

[59]Keyser's Appeal, 57 Pa. 236.

[60]Johnston's Estate. 185 Pa.; Cresson v. Ferree, 70 Pa. 446.

[61]Richardson's Estate, 16 Phila. 326,

[62]Cresson v. Ferree, 70 Pa. 446.

the house was directed to be sold and the proceeds divided among the surviving heirs of the testator. The direction to sell was valid.[63]

THE TIME OF ENDING OF AN ESTATE.

The rule concerning perpetuities prescribes nothing as to the duration of the estate which is once brought into existence. Within the permitted period a fee, an estate for 1000 years, or a life estate may be made to vest, and thus vesting it will be valid. If the estates following it are vested at the same time, or not later than lives in being *plus* twenty-one years, they also will be valid. After the death of annuitants, the testator directed that payments of the income of his estate should be made to the Academy of Natural Sciences until they amounted to $20,000, and after the completion of these payments, gave $500,000 of the corpus to the University of Pennsylvania. Of the gift to the Academy, the court said, "It takes effect immediately at the expiration of lives in being at the death of the testator; and an interest which thus begins, is not obnoxious to the rule, though it may end at a very remote time."[64] An estate vested in a trustee for seventy-five years, commencing immediately after the death of the testator, is not forbidden by the rule.[65]

SERIES OF CONTINGENT BEQUESTS.

A's will directed that if, her husband surviving her, he should not divide his estate equally among their children, or if he should, during his life give to the daughters shares of his estate, without giving a corresponding share to the son C, her executor should invest her estate, pay the income to C during life; then transfer the estate to his appointees by will, or, he making no appointment, to his right heirs. There was in this, no violation of the rule against perpetuities. The event on which the bequests were suspended, must occur during lives in being. The ulterior gift was to persons who would be alive at the death of the son, who was alive when the will went into operation.[66]

EXECUTORY DEVISE.

A devise to persons not in existence, or not yet having the qualities which will entitle them, is not void, if they must come

[63]Nicholson v. Bettle, 57 Pa. 384.

[64]Lennig's Estate, 154 Pa. 209; Lawrence's Estate; Ronckendorff's Estate, 1 Dist. 258. Johnston's Estate, 185 Pa. 179.

[65]Johnston's Estate, 185 Pa. 179.

[66]Brooks' Estate, 140 Pa. 84.

into existence or acquire these qualities, within the period of the rule. Hence, a devise to A (who is unmarried) his wife and children, will, on his subsequent marriage and the birth of children, give a life estate to them concurrent with his own. Although the wife's life estate is contingent until her marriage, and that of the children contingent until their birth, these events must happen, if at all, during A's lifetime.[67]

CONDITIONAL LIMITATIONS.

Land or personalty may be given to A, for a term of years, for life, or in fee, with a proviso that if a certain thing shall or shall not happen, A's interest shall come to an end, and an interest similar or dissimilar in duration, pass to B. A's interest is vested, but subject to liability to be divested. B's interest is contingent until the occurrence of the event. If this event may occur beyond lives in being and twenty-one years, or beyond twenty-one years, when no life is adopted as a measure, the rule against perpetuities is violated. The gift ever is void. A devise was made to life tenants, followed by a remainder in fee, upon the "express condition" that the owners shall not build in the garden spot on the south end of the dwelling house, and in case of breach of this condition, the estate was transferred to trustees for a charity. The limitation over was void.[68] Bequest to a son of a share in an estate, but if he died under thirty years of age, leaving issue, his share was to remain invested, and to be divided among his issue when they should reach the age of thirty years. As this bequest over did not vest in the issue until they reached the age of thirty years, they not having been in existence when the bequest went into operation, it was void.[69] A devise being to a church in fee, the proviso that "if at any time the same shall be directly or indirectly disposed of, then this devise shall become void" is invalid, not merely because it is a restraint upon alienation,[70] but because the forbidden conveyance might occur at any time however remote.[71]

[67]Mitchell v. Long, 80 Pa. 516.

[68]Smith v. Townsend, 32 Pa. 434.

[69]Ward's Estate, 8 Dist. 701. A gift of income to a son for life; then to the children of the son. Upon the death of any such children, without leaving issue to survive, the gift was transferred to the testator's other children. This provision for transfer was probably void; Myers' Estate, 17 Phila. 425.

[70]Not a good reason, in the case of a charity, possibly.

[71]St. Luke's Church, 1 Walker, 283.

FAILURE OF ISSUE.

When land is devised to A and his heirs, with a proviso that upon the failure of issue, it shall pass over to B, the validity of the direction in favor of B will depend on the time within which the contemplated failure of issue is to occur. If it is to occur at A's death, or within twenty-one years after A's death, the gift over would be valid.[72] If it is to occur, at any time whether within or beyond that period; *a fortiori*, if it is to occur beyond and not within that period, the gift over would be void.[73] That a life estate in X precedes a fee in A, which is subject to this conditional limitation, does not affect the principle which determines the validity of this limitation.[74] A devise to A for life, is followed by one to her child in fee, but if the child should not live to be twenty-one years, nor marry, then over to X. The limitation to X is valid, the child dying before becoming twenty-one years old and unmarried.[75] If in a devise to A and his heirs, it is limited that if he should not will it, at his death, the estate should go over to B, the limitation over is valid.[76] A devise to a trustee for A, with direction, if the land is sold, to pay the proceeds over to A, if she has issue, or if she lives to be twenty-five years old, otherwise to pay the proceeds to X. A died at twenty-three years of age, without issue. The limitation over to X was valid. It occurred within lives in being.[77] A failure of issue at the death of a life legatee, or within twenty-one years thereafter, is not too remote.[78] A devise in trust for A and B for life, remainder on the death of either without issue, to the survivor in fee; remainder, as to the survivor's original share, to X, on his dying without surviving issue, and executory devise of the share coming from the first of the two to die, on the same event: the executory devise is valid, since it must take effect, if at all, at the end of a life in being when the testator died.[79]

[72]Ingersoll's Appeal, 86 Pa. 240.

[73]In Buchanan v. Sheffer, 2 Y. 374, the court did not determine whether the failure of issue meant was definite or indefinite. In either case, the husband of the devisee took curtesy.

[74]De Haas v. Bunn, 2 Pa. 335.

[75]Wells v. Ritter, 3 Wh. 208.

[76]Boyd v. Bigham, 4 Pa. 102.

[77]Kelso v. Dickey, 7 W. & S. 279.

[78]Weinbrenner's Estate, 173 Pa. 440.

[79]Lovett v. Lovett, 10 Phila. 537.

CONDITIONAL LIMITATIONS AS TO MONEY

Executory devises of money, or chattels, as well as of land, are possible. A gave $550 to a daughter, payable in installments after she reached the age of eighteen years. The will provided that if she should die before attaining the age of twenty-one years, unmarried or without issue, then, in either case, the bequest should devolve on another. Understanding this to mean that if she died under twenty-one years, and unmarried, or died under twenty-one years, without issue, though married, the legacy should go over, but not if she died over twenty-one, without issue, or under twenty-one, but with issue, the legacy was held not divested by her death over twenty-one being married, but leaving no issue.[80] The limitation over was not void, because it occurred, if at all, at the close of the legatee's life.

POWER OF APPOINTMENT.

The power to appoint may itself be made capable of being exercised beyond lives in being plus twenty-one years, or beyond twenty-one years. When the creator of the power intends it to subsist for this period, it is wholly bad, because it may not be exercised, and the interest to be created by its exercise may not vest, until after the permissible period.[81] A power to sell land must be limited to the period of the rule, for the land is appointed to the person who may become the buyer, and the interest to be created by its exercise would be contingent until such exercise. "We may concede," says Sharswood J., "that a general power over an estate without limitation of time—unless after an estate tail—would violate the rule against the creation of perpetuities."[82] When a power is given to X to be exercised by him only, it is limited to his lifetime and is not, therefore, of too great a duration,[83] and when the time for exercising the power is not defined by its creator, it need not be void because the courts holding that it must be exercised within a reasonable time, may compel its exercise therein,[84] and probably forbid its exercise beyond. A special power to appoint by deed, or a power to appoint by will

[80]Scott v. Price, 2 S. & R. 59.

[81]Lawrence's Estate, 136 Pa. 354.

[82]Cresson v. Ferree, 70 Pa. 446. The power was here limited to lives in being and was valid. Cf. Richardson's Estate, 16 Phila. 326; Keyser's Appeal, 57 Pa. 236.

[83]Lawrence's Estate, 136 Pa. 354.

[84]Cooper's Estate, 150 Pa. 576. Cf. Marshall's Estate, 138 Pa. 260.

given to the unborn child of a living person is bad because it may not be exercised within the proper time. A general power in this unborn person is so like an estate, that it will be valid.[85]

VALIDITY OF APPOINTMENT.

Even when the power itself is not bad, the particular mode in which it is exercised, may be bad. Generally, the validity of an appointment is to be determined by regarding the appointment as having been made by the will or deed which created it.[86] If the limitation, made by the appointment, if made by the donor of the power instead of the power itself, would have been good, the appointment will be good; if the limitation made by the donor would have been bad, the appointment will be bad. "The obvious test," said Paxson J., "of the validity of the execution of the power is to write that portion of Mrs. Smith's will [containing the appointment] into the will of Lewis Ryan [the donor of the power and of the estate].[87] The period of suspension of the vesting of the interest created or to be created by the appointment, is to be considered as beginning, not with the appointment, but with the creation of the power.[88] Under this principle, when A devised land to B for life, or to X in trust for B, for life, remainder to her appointees by will, it was held that a devise by B, in the exercise of this power, to B's children for life, remainder to the Baptist Union for Ministerial Education was valid, both as to the children's life estate and to the Union's remainder.[89] A devises an estate in trust for his daughter B for life, then for such persons as B shall appoint by will. B, by will, gave the estate for his life to her husband, remainder to her son C for life, remainder in fee to C's issue. C was B's son, born after the death of A. The gift to him was valid. C's estate vested at the death of B. It is immaterial whether he was born before or

[85]Mifflin's Appeal, 121 Pa. 205.

[86]If a daughter appoints $25,000 to her son on his reaching the age of twenty-five years and he is already so old that he will reach that age in twenty-one years from her own death, the appointment is sound. Boyd's Estate, 199 Pa. 487.

[87]Smith's Appeal, 88 Pa. 492; Ronckendorff's Estate, 11 Pa. C.C. 447.

[88]Lawrence's Estate, 136 Pa. 354.

[89]Lawrence's Estate, 136 Pa. 354. Attention is directed to the fact that all the children of B were born during the lifetime of A, but it is difficult to see how that is important. It had been erroneously held in Smith's Appeal 88 Pa. 492, that the gift to the children for life, in a similar arrangement was void, though all the children had been born in the original testator's lifetime.

after the death of A.[90] A devised his property in trust for his daughter B, for life, remainder to her appointee by will. B appointed to a trustee in trust for her son C, for life; remainder should C leave children and widow, to them in such proportions as C, should by will appoint. If he made no appointment, then in trust for those, who under the law would be his heirs, he owning the property in fee. Should only a widow survive C, one-third of the estate was given to her, unless the son C, by will, ordered otherwise. The appointment by B to the widow and children of C, was bad, because they might not come into existence within twenty-one years of B's death, C not having been born when A died.[91]

WHEN THE POWER IS GENERAL.

A power to appoint to particular persons, or to appoint by will and not by deed, is a special power, and the principle thus stated is applicable to it. The power of vesting under an appointment made in pursuance of it must not exceed lives in being, when the power was created, and twenty-one years. But, when the power is general; when, i. e., the donee of the power may, appoint by deed, or by will, and may appoint anybody, and therefore himself, he may be considered as virtual owner of the land or chattels, and the vesting of the interest therein created by his appointment will need to occur only within lives in being at the time of the exercise of the power plus twenty-one years, and not within lives in being when the power was bestowed, plus twenty-one years. In Mifflin's Appeal[92] A by deed conveyed land to X in trust for B for B's lifetime; and from her death, in trust for such uses and estates as she, by her last will should order and appoint. The deed however directed that if B should at any time desire to sell or mortgage the land and should by writing order and direct it to be sold or mortgaged for her use, X should sell or mortgage it. There were therefore two powers in B, one to appoint by will, and the other to require the trustee to sell or mortgage for her benefit. Forty years after the deed was made, B died and not having exercised through the trustee the power to sell or mortgage, devised the land to Z in trust for her children during their lifetime, and on the decease

[90]Ronckendorff's Estate, 1 Dist. 258; 11 Pa. C, C. 447. Whether the remainder in fee to C's issue was valid, not considered.

[91]Boyd's Estate, 199 Pa. 487.

[92]121 Pa. 205. Cf. Lawrence's Estate, 136 Pa. 354.

of any child, in trust to convey his or her share to any issue of such child. Some of A's children had been born before, some were born after the execution of the deed. The latter were therefore not in existence when the deed was made, and the gift to their issue might not vest until a point of time beyond lives in being at that time and twenty-one years. The issue of such children were nevertheless entitled to the land, because the remainder vested in them not later than the close of the life of the children of B, all of whom were alive when her will went into effect. B was treated as the owner, and her appointment was regarded as if it had been a primary disposition of her own land.

APPOINTMENT OF PERSONS NOT IN EXISTENCE WHEN DONOR OF POWER DIES.

The fact that the power permits an appointment of a remainder to persons who are not in existence during the life of the donor, does not impair the power or the appointment under it, of persons to take the remainder, who are or come into existence during the donor's life, or within twenty-one years thereafter.[93] A by will gave a part of his estate for life to his son B, and after B's death to the use of such of his children and issue, and in such shares and estates, as B should by will appoint. If B made no appointment, then to the use of his children or issue, as tenants in common. In default of issue, then to such persons as B should by will appoint. In default of appointments, to the other children of the testator. B left surviving him only one child, C, so that B's power of appointment which was simply to select between two or more children became void. B nevertheless by will declared that until the expiration of twenty-one years after the death of the surviving brother or sister of B, he bequeathed the property to C, upon the express condition that he shall not convey it or do anything that would lead to its being taken in execution, or under the insolvent or bankrupt laws; and provided that if C did any of these things, and died within the twenty-one years, leaving issue, the estate should go to the issue; if no issue, over to others. As, B having only one child, his power of appointment lapsed, the appointment made by him was void. Had he had the power, the appointment would not have infringed the rule against perpetuities, though adds Paxson, J., "approaching dangerously near the border." The gift to C for

[93]Lawrence's Estate, 136 Pa. 354; Ronckendorff's Estate, 1 Dist. 258; Boyd's Estate, 199 Pa. 487.

twenty-one years after the death of brothers and sisters of B was valid, though he had not been born till after the death of A. The gift over, within the twenty-one years, would have involved no perpetuity because it would occur within twenty-one years after lives in being when A died.[94] A decision[95] had been made by Paxson, J., in 1879, that when A devised a life estate to B, with power of appointing the remainder, an appointment by B of the remainder to a person who was not in existence during A's lifetime, or to a class of persons some of whom might prove to be persons who had not thus been in existence, was void. The law had for centuries tolerated remainders after a life estate, contingent until the close of that estate, without regard to the existence or non-existence of the remaindermen at the time of the creation of them. Yet that is precisely what was here condemned. Surprising then, as this decision was, it is still more surprising that ten years later Paxson, then Chief Justice was apparently not yet convinced of its erroneousness. "Subsequent reflection" he remarked[96] "has left *some doubt* (!) in my mind as to the soundness of the ruling in that case upon the main question involved." No doubt of its error survived, when Lawrence's Estate[97] was written.

EFFECT OF VIOLATION OF THE RULE.

When the rule is violated by any provision in a will or deed, the whole will or deed is not vitiated, but only such estates or interests thereby created which contravene the rule. A devise to A for life followed by a contingent executory devise to vest thirty years after the close of the life estate, would not be void, because of the voidness of the executory devise.[98] A devise to A for life remainder to such persons as A shall appoint. A appoints her children for life, remainder to X. Though the remainder to X were too remote from the death of the testator, the appointment to the children of A, for life, would not be invalid.[99] Nor would a vested interest, to take effect in possession after the expiration of the

[94]Peffer's Appeal, 120 Pa. 235.

[95]Smith's Appeal, 88 Pa. 492. It was followed in Gardette's Estate, 16 Phila. 264. The correctness of Smith's Appeal is tacitly assumed by Green, J., in Mifflin's Appeal, 121 Pa. 205.

[96]Croggins' Appeal, 124 Pa. 10.

[97]136 Pa. 354.

[98]Hillyard v. Miller, 10 Pa. 326; Lennig's Estate, 154 Pa. 209.

[99]Lawrence's Estate, 135 Pa. 354; Van Sykel's Estate, 9 Dist. 367.

void contingent interest, be impaired. On the contrary, the enjoyment of it would be accelerated. If there is a valid residuary devise or bequest, it will carry prior contingent devises or bequests which the rule annuls. If there is no residuary devise, the testator will die intestate as to the interest which he has ineffectively disposed of. A gift to a son for life, remainder to his children for their lives; remainder to such person as shall at their death be heirs of the testator. The second remainder being too remote, the only child of the testator, took it as a reversion as heir.[1] When a conditional limitation is void, not only does the estate contingent upon it not come into existence, but the prior estate which was intended to be divested by the event, becomes absolute. A devise in fee was subject to the condition that if buildings should ever be erected at a certain spot on the land, it should pass over to a charity. Since the limitation over was upon too remote an event, the fee already devised was absolute.[2] If, the will directing the estate to go to the appointees of X, or in default of appointment to Y, the appointment is invalid because violating the rule concerning perpetuities, the gift to Y will take effect.[3]

EFFECT OF VOIDNESS ON PRIOR TRUST.

A trust may be made, under which for a time, certain persons are to receive the income from the estate, and at the end of which time, the estate in specie, or transformed into money by a sale, is to pass to certain persons, who may or may not be the same as those who have received the income. If the ultimate trust is void because of violating the rule against perpetuities, will its voidness infect the intermediate trust with voidness? Why should it? If an intermediate legal estate is not void, because an ulterior estate is, why should an intermediate trust be? The evidence may convince the court that the testator would not have erected the trust, except to realize the ultimate destination of his estate, and, disappointing him with regard to the latter, by the application of the rule concerning perpetuities, may be convinced that he will not be disappointed with regard to the former, by quashing it. The doctrine is not unfamiliar that a trust will not be sustained after the objects of its establishment are accom-

[1]Donohue v. McNichols, 61 Pa. 73; Davenport v. Harris, 3 Gr. 164; Gerber's Estate, 196 Pa.; Boyd's Estate, 199 Pa. 487.

[2]Smith v. Townsend, 32 Pa. 434; Ward's Estate, 8 Dist. 701.

[3]Pepper's Appeal, 120 Pa; Gardette's Estate, 16 Phila. 264.

plished, or after the accomplishment of them has become unattainable. There is however always grave room for error, in deciding what the object of the testator was. In Johnston's Estate[4] a trust was created for seventy-five years. The trustee was to collect the rents and income, and pay them to the testator's children, and the children of such of them as might die. After the seventy-five years the land was to be sold and the proceeds paid to the then living children, or the children of children then dead. It was quite possible to say that the testator's intention in erecting this trust, was to preserve his estate from loss from the possible improvidence or misfortune of his children. He might have directed a trust for the life of all his children, and no one would have suspected that his object was anything other than to prevent the hazards of that control which is incident to a legal ownership, a perfectly legitimate object. But, after thus disposing of the estate for the lives of the children, it would still remain necessary to die intestate as to the residue, or to dispose of it.

How from the fact that a disposition is made of this residue, the inference can be drawn that the trust existed for the sake of this disposition, and not this disposition for the sake of the trust, of which it was a necessary complement, it is rather hard to discover. Yet it was the opinion of the court that the seventy-five years trust existed for the sake of the final disposition, and not *vice versa*. "It will not be pretended (!) that the particular estate was designed to serve any purpose of its own, distinct from the limitation over. On the contrary, it is evident (!) that it was adopted simply as a means to an end; a hook upon which to hang suspended, a tied-up estate, until such time as testator desired it to be opened and parted. How does it in any way, enforce testator's wishes, to leave the hook in its place, when there is no estate to suspend upon it?" But why gratuitously say that the trust was adopted as the means to the postponement of the vesting of the estate? What apparent reason was there for desiring the postponement *per se*? Why refuse to see that the primary and only object of the testator was the avoidance of alienability by children, so that their enjoyment of the rents and income during life should not be imperilled? Nevertheless, because the direction to sell and distribute after seventy-five years was void, the court decided that the trust during the

[4] 185 Pa. 179.

seventy-five years was void, and the devise was wholly void.[5] The principle of this decision has been adopted in two later cases, in Gerber's Estate,[6] where the auditor's imagination was powerfully wrought up by the figure of the "hook," and in Kountz's Estate[7] where the language of Potter J., would suggest that he thought that whenever a later disposition fails because of the rule against perpetuities, earlier dispositions in trust will fail. Remarking that the period of sale was too remote, he adds "That being the case, the antecedent particular estate would fail also, and the heirs at law of the testator are entitled to immediate possession." However, in Moore's Estate,[8] a trust for children was held valid, despite the voidness of a remainder given to a charity in less than a calendar month before the death of the donor, and in Goddard's Estate[9] the voidness of an ulterior disposition was assumed not to vitiate an intervening trust.

GIFTS TO CHARITIES.

The act of May 9th, 1889, and later acts substantially reenacting it, declare that no disposition of property for any religious or charitable use shall fail for want of a trustee, or because given in perpetuity. The word "perpetuity" has too senses, and probably has them here, describing an incapacity to alienate a vested estate, and an undue suspension of the vesting of an estate. A free library,[10] a supply of books, instruments, machines for technological instruction in an university, and a gift for free scholarships, are charities.[11] A gift to a university in aid of education, is not rendered invalid because it is not to vest until a time which may exceed lives in being plus twenty-one years.[12] The fact that a Free Library Association is not incorporated when the devise to it, intended to operate at death, is made, and that it may not become incorporated for more than twenty-one years does not avoid it. A corporation being formed in order to receive the devise, will be able to take it.[13] Indeed, independently of

[5]Gray, Perpetuities, p. 221, says of this decision, it "seems difficult to maintain."

[6]196 Pa. 366.

[7]213 Pa. 390.

[8]198 Pa. 611.

[9]198 Pa. 454.

[10]Pepper's Estate, 154 Pa. 331.

[11]Lennig's Estate, 154 Pa. 209.

[12]Lennig's Estate, 154 Pa. 209. Cf. Franklin's Estate, 150 Pa. 437.

[13]Peppers' Estate, 154 Pa. 331.

statute, gifts to charities have been sustained, notwithstanding their want of incorporation.[14] In Smith v. Townsend,[15] a gift in defeasance of a prior fee, on the happening of a certain event, to a charity was treated as void, because the event might not occur within the period of the rule.[16]

[14]Zeisweiss v. James, 63 Pa. 465; Witman v. Lex, 17 S & R 93.

[15]32 Pa. 434.

[16]The senses of the word "perpetuities" are vaguely conceived and discriminated in Shallcross' Estate; 200 Pa., 122; Richardson's Estate, 16 Phila. 326; Hillyards v. Miller, 10 Pa. 326; Yard's Appeal, 64 Pa. 95; Stetson v. Rosenberger, 196 Pa. 534; Turney's Estate, 2 Dist. 524; Smith's Estate, 181 Pa. 109; Cooper's Estate, 150 Pa. 576; Echternacht's Estate, 5 Dist. 298.

# MOOT COURT.

## ANDERSON vs. TITLE INSURANCE CO.

**Interpretation of Contract of Insurance. Measure of damages.**

### STATEMENT OF THE CASE.

Anderson had gone into a farm to which he had no right, and was not disturbed in the possession.

At the end or four years, he applied to Defendant for an insurance of his title for $8,000. He paid a premium of $200 and the Company issued to him a policy wherein it covenanted to indemnify and insure him, his heirs, devisees or grantees to whom he transferred the policy with the Company's consent against all loss to the extent of $8,000 arising from defect of title.

He neither concealed nor misrepresented anything to the Company.

A year afterwards desiring to sell the land, one Jacobs said he would pay $10,000 for it, but, on discovering the state of title, refused longer to negotiate. Anderson then brought assumpsit on policy claiming $8,000.

### OPINION OF THE COURT.

EDWARDS, J.—By the act of May 9th, 1889 P. L. 159, Title Insurance Companies have "power and right to make insurance of every kind pertaining to or connected with titles to real estate and to make, execute and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor."

If Anderson had made, with the consent of the defendant company, a contract that would not be declared void by Statute of Frauds, there is possibly no doubt that he could have successfully maintained an action for any actual loss he may have sustained.

Instead of making a contract, valid within Statute of Frauds, for the sale of land, Jacobs said he would pay $10,000 for it, but on investigating

the title, he discovered that the plaintiff was not the real owner and so Jacobs refused to negotiate any further.

To make a contract for the sale of land so the Statute of Frauds will not operate against it, it must be in writing and signed by parties, Colton v. Seldon, 5 Watts, 525, or there must be a parol contract with delivery of possession, part payment of purchase money, and making of valuable improvements, Milliken v. Dravo, 67 Pa. 230; or there must be labor and valuable improvements that could not be compensated for in damages, McKowen v. McDonald, 43 Pa. 441 or similar conditions that have been recognized as sufficient to take it out of the Statute.

In this case, we have only a naked offer of Jacobs, that he would pay a certain price for the property.

There is no evidence of any loss except the loss of a prospective bargain and that is not sufficient even to maintain an action against Jacobs for loss of bargain, Meason v. Kaine, 67 Pa. 126.

The plaintiff had not according to the requirement of his policy secured the consent of the defendant company to grant the land to Jacobs, neither had he made a valid contract in keeping with the Statute of Frauds; so under all circumstances of the case as presented in statement of facts, we fail to see how he can maintain an action of assumpsit on the policy.

We therefore give judgment for the defendant company.

## OPINION OF SUPREME COURT.

Wm. Anderson paid $200 to the defendant company, for its covenant to insure him, his heirs and assigns "against all loss, to the extent of $8,000, arising from defect of title."

It is not contended by the learned court below, that this contract is voidable or void. No misrepresentation or concealment on the part of Anderson, makes it voidable. It is not in excess of the power of the corporation nor against public policy, for the law under which the defendant is organized contemplates the making of precisely such contracts.

Has the event occurred then, which entitles the plaintiff to the indemnity? The insurance is against all loss arising from defect of title. The title meant, is a title in fee simple. The fee was worth, judging from Anderson's willingness to sell it at that price, $10,000 or thereabouts.

That his title is defective is clear. It consists simply in an adverse possession, which had, at the time of the obtaining of the policy, lasted four years. It has since then, lasted a few years longer. Has Anderson suffered any loss from the defectiveness of his title?

He had found Jacobs who was willing to pay him for a marketable fee $10,000, but who, on investigating and finding the title defective, refused to negotiate further. The learned court below has assumed that the only loss Anderson has suffered, is the loss of his chance to obtain this $10,000. Satisfying itself that he had no contract with Jacobs which, save for the defect of title, could have been enforced, it has concluded that he has lost nothing. It is true that Anderson had acquired no right to receive from Jacobs $10,000.

Jacobs however had orally agreed to buy the land, and to pay $10,000 for it. Was this contract void, as the learned court assumes? By no means. The performance of it is obligatory on the vendee, and if he fails to perform, he is compellable to pay damages; and the damages that he

could be compelled to pay, are not nominal. They are the difference between the value of the land at the time of breach, and the price agreed to be paid. See II Forum, p. 202. If the fee of the land was worth $8,000, the damages would be $2,000. The defectiveness and unmarketability of the title have made the recovery of these damages impossible. Surely there has been, apparently, a loss. At least the plaintiff should have been allowed to show that there had, and to recover what he should thus show.

We are of opinion moreover, that had there been no contract with any one to sell this land, there would have been a loss in the sense of the policy. The object of the insurance of the title, is not simply to protect against actual loss, in future attempted sales, arising from the discovered defects of the title, but loss from the actual inferiority of the title to that which the assured is warranted to have. "Loss." said Potter, J., "is a relative term. Failure to keep that which one has, is loss." Foehrenbach v. Title & Trust Co., 217 Pa. 331. The company virtually said, "You are in our judgment the owner in fee of the entire interest in this property, and we will back our opinion by agreeing to hold you harmless, up to the amount of the policy, in case for any reason our judgment in this respect should prove to be mistaken." *Ibid.* An object of the insurance is to secure to the assured "relief of mind," as respects the soundness of the title.

Now it is true that Anderson still retains the possession, and in a sense, therefore, still has all that he ever had. But, the insurance of title is not a guaranty against loss of possession, by reason of the badness of title; or against loss of the power to make profitable sales of the land, for that reason. It is a guaranty that the title *is* what it is warranted to be, and if it is not, it obliges the insurer to pay, as damages, the difference between the value of the land, the title to it being what it is warranted to be, and the less value of it, the title being what it actually is. An indefeasible fee in this land was, let us suppose, worth $10,000. The actual title which Anderson had exposed him to eviction at any time, by the real owner. It was good, so long as he retained the possession, as against every other person. It was possibly worth $2,000 or $1,000. The loss is $9,000 or $8,000. Anderson paid $200 to the defendant for its undertaking to pay him as much as $8,000, if he should in fact not have an indefeasible title, and if the value of the title he actually had was so much less than the value of such indefeasible title.

It follows that the learned court below should have submitted to the jury the question of the amount of damages suffered.

Judgment reversed with *v. f. d. n.*

## JONATHAN STRIPE vs. WILLIAM ALLEN.

**Death by wrongful act in another state. Suit therefor here. The statute of limitations of another state.**

### STATEMENT OF THE CASE.

Charles Stripe was killed in New Jersey by the wrongful act of Allen. The plaintiff is, under the law of that state, entitled to damages. In that state the suit must be begun in six (6) months from the death. Allen being

found in Cumberland County, Pennsylvania, the action was begun here eleven (11) months after the death. Allen demurs: (1) The action on the New Jersey statute can not be maintained in Pennsylvania. (2) If it can be here maintained, it was brought too late.

Mulhearn, for the plaintiff.

Ambrose, for the defendant.

OPINION OF THE COURT.

FALLER, J.—The first question which the demurer raises is, can this action be maintained on the New Jersey statute in Pennsylvania? Assuming, for the present, that the action is not barred by the New Jersey limitation, we answer that it can. This question has been well settled for Pennsylvania in the case of Knight vs. West Jersey Railroad Co., 108 Pa. 250. The rule is, that when a right of action has accrued in a foreign state by common law or statutory law, the action, if it is of a transitory nature, may be brought in Pennsylvania on the principle of comity, if the foreign law does not conflict with the policy of the law of this state.

The question raised by the second point is, does the lex loci or the lex fori govern as to the limitation of the time in which the action may be brought? The Act of June 26th, 1895, P. L. 375, P. & L. Dig. Vol. 3, Supp. p. 366, provides, "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action in any of the courts of this Commonwealth."

We can locate no decision under this statute, and believe that its constitutionality has never been decided. That it may be unconstitutional was suggested by Sulzberger, J. in the case of Dickerson vs. The Central R. R. of N. J., 7 Pa. Dis. Rep. 104.

Under this Act the demurrer would be sustained, but we believe we can obtain the same result without depending upon it, or deciding its constitutionality. The Pennsylvania cases bearing on the point in question are cases where the right of action accrued before the Act took effect, and they have invariably held, that when a cause of action arises under the law of another state, and the action is brought in this state, the remedy and course of procedure are governed by the law of Pennsylvania. And statutes of limitations are held to affect the remedy only, and not to extinguish the cause af action. Morgan vs. Camden & Atlantic R. R. Co., 2 Pa. C. C. 97; Morgan vs. Newville, 24 P. F. Smith, 52; Watson vs. Brewster, 1 Pa. 381; Bolton vs. Pennsylvania Company, 88 Pa. 261.

This is good law when applied to ordinary statutes of limitation which limit rights generally, or as a class, or a right of action arising under another statute; but in the case before us the situation is different. Included in the New Jersey statute on which the plaintiff's cause of action rests, there is a limitation of the right, founded on a requirement that it be enforced within a specified time. The statute first declares what the cause of action shall be, then stipulates for whose benefit the action may be brought, and then adds: "Provided, that every such action shall be commenced within "six" calendar months after the death of such deceased." It is a right of action 'upon condition.' An action for recovery within six months is the exclusive remedy. At the expiration of six months the cause of action, as well as the liability of the defendant, is extinguished. The similar Pennsylvania

statute does not have any extra territorial effect, and the plaintiff's case must stand or fall under the New Jersey statute. This case is the exception to the general rule, which is as we have previonsly stated it. The rule for the exception is, that a cause of action arising under a statute of a foreign state, when that statute not only creates the cause of action but prescribes certain exclusive remedies and also limits the time the liability will continue, in an action brought under it in this state, the lex loci must govern as to the time in which the action must be brought. The defendant's liability having been extinguished five months before this action was brought, the plaintiff has nothing upon which to base his claim.

The demurrer is sustained.

OPINION OF SUPREME COURT.

When a contract is made in New Jersey, its validity is determined by the law of that state. Its common law is as much *its* law, as is its statute law, and it would be profoundly unphilosophical to distinguish such obligations as spring from the former, from such as spring from the latter, and to say that those of the former class may more readily be enforced in Pennsylvania than those of the latter class. When actions on New Jersey contracts are brought in Pennsylvania we are not accustomed to hear that it is simply the courtesy of the judges that tolerates them, or that allows them to advance to judgment and execution. Our courts cheerfully, as if it were a matter of course, enforce, in such actions both the New Jersey common law and the New Jersey statute law, and nobody thinks they have done anything exceptionally chivalrous or righteous.

Why should the attitude of the courts of Pennsylvania be different towards causes of action arising in New Jersey, which are not contractual, but tortious? The contract imposes obligations, because the law of New Jersey says it shall. The tort imposes obligations, because the law of New Jersey says it shall. Some obligations founded on tort, like some founded on contract, spring from its common law, some from its statute law. There is no more justification for a Pennsylvania court's refusing to enforce the statute-created tort obligation, than for refusing to enforce the common-law tort obligation; none more, for refusing to enforce the New Jersey tort obligation, than the New Jersey contract obligation.

A court of common pleas of Philadelphia once thought it should not entertain a suit based on a tort liability created by a New Jersey statute; Knight v. Railroad Co., 13 W. N. C. 251: and even Trunkey, J., reserved a decision of the question as if there were something portentous in it, in Patton v. P. C. Railway Co. 96 Pa. 159. Since that time, the hallucination that there was really a new problem to wrestle with, has been dissipated, and the courts of this state have frankly admitted to themselves that they may and should enforce the obligations springing under New Jersey law, from wrongfully caused deaths in that state. Knight v. West Jersey Railroad, 108 Pa. 250, Usher v. Railroad Co. 126 Pa. 206; Cf. Phillips v. Library Co. 141 Pa. 462.

The law of New Jersey which creates the liability for a death resulting from a wrongful act, also prescribes that the action to enforce it shall be brought within six months following the death. The present action was begun eleven months thereafter. The learned court below has correctly

said that the statute of limitations of the state where the cause of action occurred, will not, at common law, be enforced in Pennsylvania; but only the statute of this state. The common law has been superseded by the act of June 26th, 1895, and the limitary period of the state in which the cause of action occurred, must now be applied here. Of the validity of this statute there can be no substantial doubt. The objections to it suggested by Sultzberger, J., are as thin and light as gossamer, and may be dismissed without anxiety.

The learned court below finding that the statute of New Jersey which creates the liability, also qualifies it by making it endure for six months only, unless an action for it is brought within that time, has held that this limitation is inseparable from the obligation, and hence must be enforced in Pennsylvania, even had the act of 1895 not been enacted, or were it unconstitutional. This view has been adopted by learned courts "The limitation prescribed by the law of the state where the injury occurred, governs the time within which the action must be brought, regardless of where the suit is tried, if the limitation is contained in the act creating the right of action. But, where the statute giving the right of action in such state, provides no limitation, the limitation prescribed by the law of the forum will govern." 8 Am. & Eng. Encyc. 886.

Judgment affirmed.

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## JAMES SLOAN vs. JOHN SLOAN, et. al.

**Resulting Trust from paying purchase money. Ejectment.**

### STATEMENT OF THE CASE.

James Sloan negotiated a purchase of a house for $5,000 from X. The money was paid, and a deed made to Wm. Sloan, father of James. Why this was done does not appear. The father was very rich, while James owned nothing but the $5,000. A year later the father died. This is ejectment by James against four brothers who claim to have taken four undivided fifths by descent.

Replogle for plaintiff.

Prokopovitsh for defendant.

### OPINION OF THE COURT.

KOPYSCIANSKI, J.—The questions raised in the case at bar are: 1. If the same were a gift? 2. A resulting trust in favor of the son. To constitute a gift there must be an intention expressed in words or acts, which does not appear in this case. William's Appeal, 106 Pa. 116; Scott vs. Sanmon, 104 Pa. 593; Forum, Vol. 8, 158. When the purchase price is paid by one person and the title is taken in the name of another person there is a resulting trust in favor of the person paying the purchase money. Bispham' Equity page 13; Sourwine vs. Claypool, 138, Pa. 126. In Farrell vs. Lloyd, 69 Pa. 239, it appeared that the father purchased the land with the son's money and even though the father in this case was a poor man, the court held that there was a resulting trust in favor of the son. In the case at

bar the son is poor only having $5,000 which he paid for the land and the father is very rich. Relying upon the case just cited holding it good law, it is much stronger ground to hold a resulting trust in favor of the son. Bispham on Equity, 140; Howell vs. Howell, 2 McCart, 75; Champlin vs. Champlin, 136 Ill. 309. From the facts presented in the case, the court holds that there is a resulting trust in favor of the son. Judgment for the plaintiff.

OPINION OF SUPERIOR COURT.

Whether William Sloan had the equitable as well as the legal title to the land in question, depended on the intention with which James, his son, procured the conveyance to him. He may have intended to give William the land. He may have intended that William should hold it for him. There is no explicit evidence concerning which of these intentions was the actual one. What then shall we presume, in its absence?

When one man pays for land, and directs that the deed shall name another as grantee, it is inferred that the grantee was intended to be a trustee for the buyer. This inference may be repelled, and that of a gift justified and required by evidence of actual intention. Certain relationships indicate that the intention was to give. If the procurer of the conveyance is the father or mother of the grantee, the courts have inferred that he or she intended the land to be an advancement or gift. The courts have justified this inference, sometimes, by suggesting that the father or mother is under a moral, and also a legal duty to support the child. This however is an inadequate explanation. If the son or daughter is already worth one million dollars, how can it be asserted that the father is under legal or moral duty to increase this wealth by an advancement or gift? Yet, the presumption would be made, even in such a case, that a gift was intended. The question is one of intention, and intention is explained by motive. The sense of duty would be, if it existed, *a* motive to give land to a son, but there are other motives. Parental affection does things without any feeling of constraint, without any thought of obligation. Fathers so often help sons or daughters, because of their affection for and pride in them, that resort to a sense of duty to explain such gifts seems artificial and even absurd.

If a parent is presumed to intend a gift, when he causes a conveyance to be gratuitously made to a son, are we to say that when the son gratuitously causes a conveyance to his father, he is to be understood to have the same intention? The courts, apparently do not so understand. "The child," it is said, "is under no obligation to support its parents, and where the purchase-money is paid by a son or daughter, and the purchase is made in the name of his or her father or mother, the presumption in favor of a resulting trust in favor of the child arises to the same extent as where the purchase is made in the name of a stranger," 15 Am. & Eng. Encyc, 1164. Startling as it is to be informed that a son is under no obligation to support his parents, no obligation moral or legal, a tenet which we are by no means bound to accept, it seems to be true that in this case supposed, no gift will be inferred, but a resulting trust. When a son purchases land, paying the purchase money, and causing his father to be made grantee in the deed, there is no presumption of a gift. Howell vs. Howell, 15 N. J. Eq. 75. Said Williams, J., in Roberts vs. Remy, 56 Ohio 249, "While it is

a familiar rule that a conveyance to a child of land purchased by the parent, is presumed to be a gift or advancement, there is no presumption that a gift is intended where a purchase is made with money belonging to a child, and the legal title taken in the name of the parent. On the contrary in the latter case, the presumption is that the title is so taken in trust for the benefit of the child, and the burden is on the holder of the legal title to overcome that presumption." Cf. Bispham, Eq. p. 140; 7th edition.

Were the presumption that of a gift, we should be inclined to hold that the additional facts revealed by the evidence, viz. that the father was already very rich and that the son owned nothing except what he invested in the purchase of the house, were sufficient to rebut it. What probability is there that under such circumstances, the son would intend to give all he had to his father, or that the father would consent to accept it? Cf. Mishey's Appeal, 107 Pa. 611.

That one of two persons holding a certain relation to each other, would be more apt to intend to give his property to the other, than the other to him, is a principle valid not merely when applied to parent and child, but when applied to husband and wife. A conveyance to a wife, procured by a husband, is understood to be a gift. But, when a wife procures by her money, a conveyance to the husband, no gift is presumed. 15 Am. & Eng. Encyc., 1158; Lloyd v. Woods, 176 Pa. 63.

That brothers are not presumed, when they cause conveyances to be made to brothers, Edwards vs. Edwards, 39 Pa. 369, or to sisters, Warren v. Steer, 112 Pa. 634, to intend a gift, is quite clear. It is possibly equally certain that children, causing conveyances to be made to parents, are not presumed to intend to make gifts. That the parents shall receive the land for their, the children's benefit, is rather inferred to have been the intention.

The learned court below has properly decided that the land belongs to James Sloan; and that no interest in it passed, at the death of William Sloan to his heirs.

Judgment affirmed.

## COMMONWEALTH v. ALLEN.

### Larceny of Electricity.

### STATEMENT OF FACTS.

Allen attached a wire to the wires of the Carlisle Light and Power Company and by means thereof he furnished his home with light for two months. The Company had no knowledge of such attachment; and it was Allen's intention to obtain the electricity without paying for it.

Goldstein for Commonwealth.

Electricity like gas may be the subject of larceny. Comm. v. Shaw, 4 Allen 308.

Harrison for defendant.

There can be no larceny of electricity.

### OPINION OF THE COURT.

BURGESS, J.—This is an indictment for the larceny of electricity. The question to be decided is whether or not electricity may be the subject

of larceny. There being no statute making it such, if larceny, it must be so on common law principles. Larceny at common law is defined to be the felonious taking and carrying away of the personal goods of another. Such property only is the subject of larceny at common law as is properly described as "goods and chattels." As soon as property is reduced into the form of a chattel, and so long as it remains in that form, it may be stolen.

A chattel is any article of movable good; and goods is defined as a movable; wares; merchandise; commodities bought and sold by merchants and traders. Does electricity come within these definitions? We think it does. The American and English Encyclopedia of Law, p. 514, says in regard to electricity, "that there seems to be no doubt that electricity is not the subject of larceny as goods and chattels within the common law definition, but because it is manufactured and sold, some jurisdictions have made it the subject of larceny by statute," and cites a Utah Statute, but no cases. We must disagree with this statement because we believe electricity to have all the requisite attributes of property. It is true that it cannot be seen, and that scientists have not been able to satisfactorily define it but can we say that it is not property because it will not excite certain of our senses; or that because of our lack of knowledge of its nature we can not call it property?

In Commonwealth vs. Shaw, 14 Allen 308, Chief Justice Bigelow says in regard to illuminating gas, that had been stolen, "It is a valuable article of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity, and of being transported from place to place." Every one of these tests given by Justice Bigelow applies exactly to electricity. Gas feloniously drawn from a pipe through which it is transmitted, in Commonwealth vs. Shaw, supra, or water in the same condition, in Ferens vs. O'Brien, 11 Q. B. D. 21, C. 238, have been held to be larceny. And we fail to see, insofar as usefulness is concerned, and in reason, why electricity should be any the less the subject of larceny.

Electricity is manufactured, stored, transported in storage batteries, transmitted along wires, measured, owned, bought, sold, and if we are not in error, stolen.

It is contended by the defendant that electricity is simply a condition, such as heat or cold. This may be true. It may be that to the scientist and particularly to the physicist, electricity is only a condition, and is only important as such, but to the lawyer, and for all business purposes it is a commodity that is the subject of commercial transaction, the same as any other personal property. One may not be able to discover the elements of which it consists, but this does not make it any the less valuable commercially, or place it without the definition of "goods and chattels."

Having decided that electricity is property it remains to be shown that the nature of the taking by Allen constituted larceny. The taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence or in a clandestine manner, or where possession is obtained either by force or surprise, or by any trick, device or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods, and when the taker intends, in any such case, fraudu-

lently to deprive the owner of his entire interest in the property, against his will. According to the statement of facts Allen had been taking this electricity and lighting his house with it for two months, without the knowledge of the Light & Power Co., and with an intention not to pay for it. This being the case, according to the principles stated it was a felonious taking. He is therefore guilty of larceny.

OPINION OF THE SUPREME COURT.

The question presented for review by this court is not whether the taking (if such it may be called) of electricity under the circumstances in this case constitute a common law crime, but whether it constitutes the common law crime of larceny. If the former question were addressed to us, we should derive much comfort from the doctrine of Comm. v. McHale, 97 Pa. St. 397, approved and followed in Comm. v. Randolph 146 Pa. St. 83. In the determination of the latter question it behooved us to have a care lest in endeavoring to protect the "public economy" we should yield to the temptations of expediency and do violence to well settled legal definitions and principles.

Accordingly, we have decided that the judgment of the learned court below must be reversed. In the opinion of this court to constitute the crime of larceny there must be a taking possession of some material substance; some portion of matter which can be separated bodily from the place where it has been and transported into another.

Lexicographers and judges may differ as to the exact meaning of the term "goods and chattels," but we think it will be universally conceded that these terms have never been understood to include anything which was not recognized as a material substance of some kind.

We have been unable to find any scientific writer of recognized authority who would assume the responsibility of declaring that electricity is a material substance. Electricity has been defined as a "cause" (Century Dictionary, 15 Cyc. 467) a "force" (Bouvier's Dictionary) and as an "agent" (Standard Dictionary) but as a general rule, the writers upon the subject frankly admit that to the question; "What is electricity," it is impossible to give an answer. (Caillard on Electricity 289, Walmsley on the Electric Current, 20; Trowbridge on "What is Electricity," 305; Tunzelman on Electricity. 5.)

If we were disposed to adopt a method of reasoning analogous to that of the learned court below we might, at this point, decide that because we do not know that electricity is not matter, therefore it is matter, therefore it is larceny to take it. We should regret, however, to see this method of reasoning adopted in criminal cases. This negative process is hardly consistent with certain well settled principles of the common law of crimes.

As a matter of fact, there is abundant authority for the proposition that electricity is not matter, and that no material substance is carried from place to place by the current. Silvanus Thompson, a Fellow of the Royal Society in a recent publication says, "Electricity is the name given to an invisible agent known to us only by the effects which it produces and by various manifestations called electrical. These manifestations, at first obscure and mysterious, are now well understood, though little is known of the precise nature of electricity itself. It is not matter." (Thompson on Electricity.) The theory that electricity is a fluid, formerly held by a few scientists is now universally repudiated. Caillard on Electricity, 289; Trowbridge on "What is Electricity, 305, 15 Cyc. 467.

A noted writer on criminal law, perhaps the greatest present day authority on the subject, in a recent contribution to the legal literature of the criminal law says, "At common law the only subjects of larceny were tangible, movable chattels; something which could be taken in possession and carried away and which had some, although trifling, intrinsic value. Anything which has length, breadth and thickness, whether it is a solid, a liquid or a gas, provided it is the subject of private ownership, may be the subject of larceny." J. H. Beale, Jr., in 25 Cyc. 12. We do not believe that the author of this article would consider electricity a tangible, movable chattel, or that it is something which has length, breadth and thickness.

The most that is known of electricity is that it is a "power," or a "force." The stealing of power is not larceny. If A should take the horse of B without his consent, for the purpose of hauling a load of coal to Newville, but with the intent to return the horse upon the completion of the journey, he would not be guilty of larceny. Rex v. Phillips, 2 East P. C. 662. Rex v. Crump, 1 Car, and P. 658, Beales Cas., 685. Com. v. Wilson, 2 Phila. Yet, during the time which A has the horse he has deprived B of its power, and that power can never be returned. If A should carry a tub of ice into the dry room of B's lumber mill and allow it to remain there until it melted and then remove the water, he would deprive B of a large amount of heat, but it will scarcely be claimed that he would be guilty of larceny.

The learned court below has placed great reliance upon Com. v. Shaw 14 Allen 308. In that case, speaking of gas, Chief Justice Bigelow said, "It is a valuable article of merchandise, bought and sold like other personal property, etc." We do not think that the present case comes within the *terms of that opinion*. Bigelow, C. J., did not say that because gas was bought and sold, etc., therefore it was a valuable article of merchandise. Everything that is bought and sold is not merchandise. Real property, ships, money, stocks and bonds are not merchandise. (Century Dictionary) Moreover nothing is said about merchandise in the common law definition of larceny. But conceding that the learned court below has brought this case within the *terms of that opinion* in Com. v. Shaw, he has not brought it within the *principle of the decision*. That case simply decided that gas is the subject of larceny. The nature of illuminating gas is well understood. It is a substance possessing perfect molecular mobility and is recognized as a form of matter. (Century Dictionary, Standard Dictionary.) The case can not therefore be cited as an authority for the proposition that something which is not matter may be the subject of larceny. Even the authorities, which claim that nothing which has not three dimensions may be the subject of larceny, concede that gas may be the subject of larceny.

The mind of the scientist is far reaching and loves to form hypotheses and theories and perhaps no subject is so susceptible to theorization as electricity; but so far as this court knows no scientist claims that electricity is matter. It would therefore be impertinent, indeed, for this court as mere men or lawyers to attempt to establish a theory which scientists not only do not affirm but which they deny. While it is true that mere men, when clothed with the judicial ermine become immune to charges of impertinence, ignorance and injustice, we do not care to place ourselves in such a position as to render it necessary to avail ourselves of this undeserved immunity.

The means of inflicting injuries are as infinite as the variety of human ingenuity and the malicious ingenuity of mankind is constantly busied in producing new inventions in the art of disturbing their neighbors and it is the object of the common law to adapt itself to the new devices of man kind to injure society and punish them as they arise. This object has not, however, been accomplished by expanding the definitions of the common law felonies but by establishing new species of offenses.

The courts of this commonwealth have manifested no inclination to extend the limits of the common law crime of larceny. Wallis v. Mease, 3 Binn. 546. Findlay v. Bear, 8 S. & R. Com. v. Boyer, 3 P. C. C. 234. Lewis v. Com. 15 S. & R. 93. Com. v. Barrett. 28 Sup. 12.

In Warner v. Com. 1 Pa. St. 154, the Supreme Court decided that "county orders" were not the subject of larceny, though there was in force at that time a statute making obligations bonds, bills of exchange and promissory notes the subject of larceny.

We do not think it will be a serious repedation to declare that electricity is not the subject of larceny.